



Best Practices for a Corporate I-9 Program

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OVERVIEW

Increasing enforcement of I-9 laws certainly caught the attention of the media in 2008. Beyond the raids and audits, the Federal Government and more than 20 states are intent on putting all employers onto the Department of Homeland Security (DHS) system for instant electronic confirmation of each new employee's work eligibility, known as E-Verify. Employers are increasingly asking how to ensure foolproof compliance; specifically, they want to know how to replace error-prone and labor-intensive processing of paper I-9s with an electronic solution for generating, signing and retaining these forms. The best systems can improve compliance while saving HR departments hundreds of hours annually in processing I-9 forms and using E-Verify. This article will discuss how company executives—working with HR, training, legal and IT departments—can proactively establish procedures to lower the risk of I-9 violations.

Know and Follow the Law

The law is very specific as to when and how Form I-9 must be completed while also instructing employers to be on guard against unlawful discrimination. The two most important points for employers to keep in mind are:

1. Form I-9 must be completed for each new employee (both citizen and non-citizen) hired after November 6, 1986; and
2. It is illegal to discriminate against work-eligible individuals.

Employers not only have to be familiar with the many I-9 requirements and deadlines, they must also know which actions taken during this process are permitted and which could potentially expose them to charges of discrimination on the basis of national origin or immigration status.

Section 1 of the form, Employee Identification and Verification, must be filled out at the time of hire, which is defined as the employment start date. The time when the form is presented to newly hired workers is another important point to remember since asking job applicants to complete Form I-9 before they are hired could be viewed as unlawful prescreening for job eligibility. But once an employee is hired, the law requires employers to take and document several steps. After completing Section 1, they must next complete Section 2, Employer Review and Verification, by examining



evidence of identity and employment eligibility within three (3) business days of the date employment begins.

Unfortunately, the requirements of the I-9 process for employers do not end with the initial completion of the form. If employees present documents showing an expiration date for employment authorization, employers must subsequently reverify employment eligibility on or before the expiration date recorded in Section 1. Finally, employers must retain completed Forms I-9 for all employees for three years after the date they hire the employee or one year after the date employment is terminated, whichever is later.

Practically all employers and workers in the United States are now affected by the I-9 verification requirements; there are some exceptions, but they are limited only to a small category of workers. Employers DO NOT need to complete a Form I-9 for independent contractors, persons employed by a contractor providing contract services (e.g., temporary agencies), and certain types of workers performing casual domestic work in a private home on a "sporadic, irregular, or intermittent basis."

When employers do not meet all the Form I-9 requirements, miss important deadlines, and/or take actions viewed as discriminatory, they place themselves at risk of government sanctions and potential employment discrimination lawsuits. It is therefore essential for employers to be continuously informed about frequent changes in the laws and regulations, especially as they pertain to the documents that employers may accept from newly hired employees during employment verification.

Avoid Discrimination in Recruiting, Hiring and Processing Forms I-9

In practice, employers should treat employees equally when recruiting and hiring, and when verifying employment eligibility and completing Form I-9. Specifically, **employers should note the following:**

1. Employers should never set different employment eligibility verification standards or require that employees present different documents because of their national origin and citizenship status. For example, employers cannot demand that non-U.S. citizens present DHS-issued documents; employees must be allowed to choose the documents they will produce from the lists of acceptable Form I-9 documents. For example, both citizens and work-authorized foreign nationals may produce a driver's license (List B) and an unrestricted Social Security card (List C) to establish identity and employment eligibility.
2. Employers should never request employment eligibility verification documents before hire and completion of Form I-9 because someone looks or sounds "foreign," or because someone states that he or she is not a U.S. citizen.
3. Employers should never refuse to accept a document—or refuse to hire an individual—because a document has a future expiration date.
4. Employers should never request that an employee present a new unexpired employment authorization document (EAD) during reverification if he or she presented an EAD during the initial verification. For reverification, each employee must be allowed to present any document either from List A or from List C. Refugees and asylees may possess EADs, but they are authorized to work based on their status and may possess other documents that prove

work authorization from List A or List C to show upon reverification, such as an unrestricted Social Security card.

5. Employers should never limit jobs to U.S. citizens unless U.S. citizenship is required for the specific position by law; regulation; executive order; or federal, state, or local government contract.

Be Aware of Penalties

The penalties for ignoring the legal requirements of the I-9 process can be quite severe, even in cases of unintentional omissions or mistakes. Civil penalties for such errors may range from \$110 to \$1,100 for each affected employee. A business with thousands of employees and multiple worksites may face a significant financial burden in noncompliance penalties. These fines may be further increased if DHS determines that an employer knowingly hired unauthorized foreign nationals. Individuals convicted of having engaged in a pattern or practice of knowingly hiring unauthorized foreign nationals may also face criminal charges and fines of up to \$3,000 per employee and/or six months' imprisonment. Other federal criminal statutes may provide higher penalties in certain fraud cases.

The law also provides for penalties in cases of unlawful discrimination. For example, employers may not specify which documents they will accept for employment eligibility verification but must instead rely on the government-approved list of documents and follow the latest DHS instructions. Employers who request and accept documents no longer listed on the Form I-9 Lists of Acceptable Documents may be subject to penalties under section 274A of the Immigration and Nationality Act (INA).

Employers who commit citizenship status or national origin discrimination may be ordered to pay a civil penalty and attorneys' fees. The penalties range from \$275 to \$2,200 for the first offense for each individual discriminated against; from \$2,200 to \$5,500 for the second offense; and for subsequent offenses, not less than \$3,300 and not more than \$11,000 for each affected person.

Employers who commit document abuse in violation of the anti-discrimination provision of the INA may similarly be ordered to pay a civil penalty of not less than \$110 and not more than \$1,100 for each individual discriminated against.

Under Title VII of the Civil Rights Act of 1964, compensatory damages may also be available where intentional discrimination is found; punitive damages may be available if the employer acted with malice or reckless indifference.

Establish Proper I-9 Procedures and Train Your Staff

Employers should start by learning about the I-9 process, establishing procedures for meeting the law's requirements and providing training to their executives, managers and HR staff. They must decide who within the company will conduct the initial I-9 processing of new hires most efficiently and in compliance with the law. They also need to decide whether the I-9 verification should be made part of the on-boarding process, when all the information for each new employee may be entered into the company database (some I-9 electronic management systems make it possible to enter this just once, saving time and money). Employers also need to consider who will be responsible for the ongoing monitoring of I-9 compliance, generating reports and conducting audits.

In setting up I-9 procedures, employers must always:

1. Ensure that employees fill out Section 1 of Form I-9 when they start work;
2. Review document(s) establishing each employee's identity and eligibility to work;
3. Properly complete Section 2 of Form I-9;
4. Retain the Form I-9 for three years after the date the person begins work or one year after the person's employment is terminated, whichever is later;
5. Upon request, provide Form I-9 to authorized officers of the Department of Homeland Security, the U.S. Department of Labor, or the Office of Special Counsel for Immigration Related Unfair Employment Practices for inspection; and
6. Avoid any actions that constitute unlawful employment discrimination.

The DHS Handbook for Employers has instructions for completing Form I-9 and includes many helpful explanations and tips. It may be downloaded in PDF from the United States Citizenship and Immigration Services (USCIS) website at www.uscis.gov.

Another free resource is an I-9 Training Slideshow available from Tracker Corp™ (www.trackercorp.com), the company that makes Tracker I-9™ (www.trackeri9.com) employment eligibility and immigration verification software. Requests for the slideshow can be sent to Tracker Corp at info@trackercorp.com. Companies may also seek help from consulting firms offering I-9-related training.

Consider Using an Electronic I-9 Management System

Even the best procedures and training may not be sufficient for achieving maximum efficiency and compliance if a company has hundreds or thousands of employees, high turnover rates and/or multiple worksites. Forms I-9 can be retained on paper, but generating and processing them electronically will mean fewer errors. Electronic I-9 systems allow for more efficient employee onboarding, space-saving and vastly improved compliance and reporting. While the employee's original documents (such as passport, visa, driver's license and SSN card, etc.) must still be presented in person, HR or other staff anywhere can enter the I-9 data into a secure system that self-audits and allows centralized control. For many employers, some type of electronic management system is essential to keep track of all the documents, deadlines and reverifications requirements. Auditing and reporting features of some of the systems available to employers can help company executives and HR staff identify potential compliance problems and spot mistakes commonly made in filling out the paper version of the form.

In processing the I-9 information, some software programs can also warn HR staff about actions that may amount to unlawful employment discrimination. Finally, electronic management of the I-9 process may help employers establish "good faith" defense in the event they are charged with knowingly hiring an unauthorized foreign national. In most cases, I-9 management systems will provide an electronic record of actions taken to achieve compliance, which employers can then show to government officials to counter charges of intentional wrongdoing.



Some I-9 software programs also help employers manage the records of employees with unusual or temporary work authorizations. The law requires that when an employee's work authorization expires, employers must reverify his or her employment eligibility. This is especially critical for foreign nationals employed in the United States on temporary work visas. The Tracker I-9 system from Tracker Corp combines both Form I-9 employment eligibility and immigration management in one comprehensive software package which generates alerts to HR staff about critical visa and I-9 work authorization deadlines.

Guarantee Security of I-9 Information

Another important point to consider is the storage of sensitive I-9 personnel data. Many employers want the benefits of electronic Form I-9 solutions but are cautious about putting sensitive information on the Internet. Most companies prefer to retain full control over this data and keep it on their own on-site company servers behind their firewall. Tracker I-9 enterprise software is designed to work with in-house company servers while still allowing managers and employees access to I-9 information from anywhere in the world. Other vendors offer I-9 management systems that store data from many companies in off-site central databases, which creates a risk of co-mingling data from different companies and raises the possibility of losing critical records if an I-9 vendor goes out of business.

Regardless of what type of data storage system is used, DHS warns employers that if they retain Forms I-9 electronically, they must implement an effective records security that satisfies several stringent requirements. Specifically, any electronic I-9 system must:

1. Ensure that only authorized personnel have access to electronic records;
2. Provide for backup and recovery of records to protect against information loss;
3. Ensure that employees are trained to minimize the risk of unauthorized or accidental alteration or erasure of electronic records; and
4. Ensure that whenever an individual creates, accesses, views, updates or corrects an electronic record, the system creates a secure and permanent record that establishes the date of access, the identify of the individual who accessed the electronic record and the particular action taken.

Note: If an employer's action or inaction results in the alteration, loss or erasure of electronic records, and the employer knew, or reasonably should have known, that the action or inaction could have that effect, the employer is in violation of Section 274A(a)(1)(B) of the INA.

E-Verify

The U.S. Government's E-Verify program (www.dhs.gov/E-Verify) for electronic employment eligibility verification may soon be made mandatory for most if not all U.S. employers. Operated by the Department of Homeland Security in partnership with the Social Security Administration, E-Verify provides an automated link to federal databases. Contractors doing business with the Federal Government are already required to use E-Verify and several states also now require its use. Some government watchers predict that it is only a matter of time before pending legislative proposals will make E-Verify mandatory for all employers nationwide. Preparing for this expected change should be



an important part of the planning process involving company executives and HR departments. Those employers who still use paper I-9 forms and want to make a switch to a paperless and more reliable system should consider an electronic solution that is E-Verify-compatible.

On June 6, 2008, President Bush made participation in the E-Verify program more attractive and advantageous for businesses and institutions when he signed an Executive Order requiring all contractors and others who do business with the Federal Government to use E-Verify. Participation in the E-Verify program may also lower the risk of immigration enforcement action against a company, but it does not mean that employers can abandon their strict observance of other I-9 compliance standards. The Executive Order points out that contractors who adopt rigorous employment eligibility confirmation policies and use E-Verify "are much less likely to face immigration enforcement actions, because they are less likely to employ unauthorized workers." The Federal Government considers E-Verify users as "generally more efficient and dependable procurement sources than contractors that do not employ the best available measures to verify the work eligibility of their workforce."

As of May 2008, the E-Verify system includes naturalization data, which USCIS claims will help instantly confirm the citizenship status of naturalized U.S. citizens hired by E-Verify employers. Naturalized citizens who have not yet updated their records with the Social Security Administration (SSA) are the largest category of work-authorized persons who initially face an SSA mismatch in E-Verify.

Recent government actions expanding the use of E-Verify program suggest that eventually all U.S. employers may be required to electronically submit I-9 forms, as is already mandated by some states. With the federal government storing more of employers' I-9 information in its databases, businesses, hospitals, universities and nonprofit institutions will come under increased pressure to have their I-9 forms and documents in good order and to maintain secure electronic records.

SUMMARY

Although I-9 compliance seems straightforward, managing the entire process can be dauntingly labor-intensive and costly without an electronic database, sophisticated I-9 management software and effective records security. It is especially difficult to be 100% compliant at multiple company locations with a paper-based process. Learning about Form I-9 regulations, instituting proper procedures, and using electronic management systems can help companies bring their workforces into greater compliance with employment and immigration laws, and avoid costly penalties.

Disclaimer

The information contained in this document is for informational purposes only and should not be construed as legal advice. Recipients of this information should not act upon it without consulting legal counsel as individual situations and facts may vary.